No. 625

In The

Supreme Court of The United States

October Term, 1964

PHILIP H. HOFF, Governor of Vermont and HOWARD E. ARMSTRONG, Secretary of State of the State of Vermont,

Appellants

vs.

T. GARRY BUCKLEY, JANETTE N. BERRY and JAMES F. FITZPATRICK,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

BRIEF OF APPELLANTS, HOFF AND ARMSTRONG

CHARLES E. GIBSON, JR.,
Attorney General

CHESTER S. KETCHAM,
Deputy Attorney General

Supreme Court Building, Montpelier, Vermont

INDEX

	PAGE
Opinion Below	2
Jurisdiction	2
Constitutions and Statutes Involved	2, 3, 4
Questions Presented	4
Statement	5
Argument:	
I. THE DISTRICT COURT ABUSED ITS DISCRETION IN ENJOINING THE GENERAL ASSEMBLY FROM ENACTING LEGISLATION PROVIDING FOR THE NORMAL OPERATION OF STATE AND MUNICIPAL GOVERNMENT PENDING A SATISFACTORY REAPPORTIONMENT OF THE GENERAL ASSEMBLY IN ACCORDANCE WITH THE ORDER OF THE COURT	6
A. *The Court Should Find an Abuse of Discretion on the Part of a District Court When the Action of Said Court in Enjoining the Passage of Legislation is Contrary to Equitable Principles and Improvident*	6
B. *Under the Facts of This Case, the Action Taken by the District Court in Enjoining the Vermont General Assembly from Enacting Legislation Other Than Reapportionment was Clearly Inequitable and Improvident*	10
C. *Under the Recent Decisions of This Court, the State Legislatures are Allowed an Opportunity to Reapportion and Judicial Relief is Appropriate Only When the Legislature Fails to Comply With the Court's Order*	16
II. THE COURT ABUSED ITS DISCRETION IN LIMITING THE TERM OF OFFICE OF MEMBERS TO THE 1965 GENERAL ASSEMBLY TO MARCH 31, 1965	18
Conclusion	19

CITATIONS

Cases: PAGE

Baker v. *Carr* (1962), 369 U.S. 186, 7 L. ed. 2d 663, 705, 82 S. Ct. 691, —— 15, 17

Cedar Rapids v. *Cox* (1961), 252 Iowa 948, 708 N.W. 2d 253 15

Clemons v. *Board of Education of Hillsboro* (1956), 228 F. 2d 853, 857 7

Dawson v. *Bomar* (1963), 322 F. 2d 445 15

Drew v. *Scranton* (1963), 229 F. Supp. 308, 310 9

Home Owners' Loan Corporation v. *Huffman* (1943), 134 F. 2d 314, 317 7

Hubbard v. *Hubbard* (1904), 77 Vt. 73, 58 A. 969, 970 8

Magraw v. *Donovan* (1958), 163 F. Supp. 184, 187, 188 17, 18

Maryland Committee for Fair Representation v. *Tawes*, 32 L.W. 4573, 4578, 377 U.S. 656, —, 12 L. ed. 2d —, 84 S. Ct. 1429, — 16, 17

National Fire Insurance Co. v. *Thompson* (1930), 281 U.S. 331, 338, 74 L. ed. 881, 887, 50 S. Ct. 326, — 7

Ohio Oil Co. v. *Conway* (1929), 279 U.S. 813, 815, 73 L. ed. 972, 973, 49 S. Ct. 256, — 8, 9

Reynolds v. *Sims* (1964), 32 L.W. 4535, 4550, 377 U.S. 533, 12 L. ed. 2d —, 84 S. Ct. 1362 16

Rhode Island Governor, Opinion to, 185 A. 2d 111 (R.I., 1962) 15

United States v. *Corrick* (1936), 298 U.S. 435, 80 L. ed. 1263, 56 S. Ct. 829 6

Constitutions:

Article XIV, United States Constitution, §1 2
Chapter II, Vermont Constitution, §38 3

PAGE

Statutes:

28 U.S.C., Chapter 81, §1253 2
28 U.S.C., Chapter 85, §1343 ..... 2, 3
28 U.S.C., Chapter 151, §2201 ..... 2, 3
42 U.S.C., Chapter 21, §1983 ..... 2, 4
42 U.S.C., Chapter 21, §1988 ..... 2, 4

In The

Supreme Court of The United States

October Term, 1964

No. 625

PHILIP H. HOFF, Governor of Vermont and HOWARD E. ARMSTRONG, Secretary of State of the State of Vermont,

Appellants

vs.

T. GARRY BUCKLEY, JANETTE N. BERRY and JAMES E. FITZPATRICK,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

BRIEF OF APPELLANTS, HOFF AND ARMSTRONG

OPINION BELOW

The Opinion and Judgment of the three-judge District Court, District of Vermont, (R. p. 46-61, 108-110) is reported in 234 F. Supp. 191.

JURISDICTION

This suit was brought under the authority of the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. 1983, 42 U.S.C. 1988, 28 U.S.C. 1343 and 28 U.S.C. 2201. The Appellees allege that they are denied the equal protection of the laws and due process of law guaranteed them under the Fourteenth Amendment to the Constitution of the United States because of the malapportionment of the Vermont Legislature. A three-judge District Court was assembled and the Court rendered an Opinion on July 10, 1964, holding that the apportionment of the Vermont General Assembly was in violation of the Fourteenth Amendment. The Judgment of the District Court was rendered on August 3, 1964. Notices of Appeal were filed by Intervenor, Roger L. MacBride, on August 29, 1964, by Defendant Samuel A. Parsons and the remaining intervenors on September 1, 1964, and by Defendants Philip H. Hoff, Governor, and Howard E. Armstrong, Secretary of State, on September 3, 1964. Jurisdiction to review a judgment of a three-judge District Court is conferred on this Court by 28 U.S.C. 1253.

CONSTITUTIONS AND STATUTES INVOLVED

ARTICLE XIV, United States Constitution

[§1. **Citizens; privileges and immunities; due process; equal protection**]

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CHAPTER II, Vermont Constitution

[§38. **Term of senators and representatives**]

SECTION 38. The term of office of Senators and Town Representatives shall be two years, commencing on the first Wednesday next after the first Monday of January following their election.

28 U.S.C., Chapter 85, §1343

§1343. **Civil rights and elective franchise**

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C., Chapter 151, §2201

§2201. **Creation of remedy**

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

42 U.S.C., Chapter 21, §1983

§1983. **Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C., Chapter 21, §1988

§1988. **Proceedings in vindication of civil rights**

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

QUESTIONS PRESENTED

1. Did the Court abuse its discretion in prohibiting the General Assembly from enacting legislation providing for the normal operation of state and municipal government pending a satisfactory reapportionment of the General Assembly in accordance with the order of the Court?

2. Did the Court abuse its discretion in limiting the term of office of members to the 1965 General Assembly to March 31, 1965?

STATEMENT

On January 22, 1963, the original Plaintiffs, T. Garry Buckley and Janette N. Lerry, filed their complaint challenging the apportionment of the General Assembly of the State of Vermont. Suit was commenced against the Governor, Lieutenant Governor, Speaker of the House and the Chairman of the Legislative Apportionment Committee. A three-judge District Court was assembled and the Court held a hearing on April 2, 1964, in order to determine Defendants' motion to dismiss. The Court ordered the complaint dismissed as to the Lieutenant Governor, the Speaker of the House and the Chairman of the Legislative Apportionment Committee. The Court further granted Appellees' motion to amend its complaint by adding Milton L. Hard as a party-plaintiff and Samuel A. Parsons, a town clerk, and Virginia B. L'Ecuyer, a county clerk, as party-defendants. James E. Fitzpatrick was later substituted for Milton L. Hard as a party-plaintiff. Leroy E. Lawrence, Erma Puffer, Samuel A. Parsons, Austin T. Foster, Lawrence Franklin, John D. Masterton, Russell Holmes, Stoyan Christowe, Cornelius Granai and Roger L. MacBride were allowed to intervene as defendants. Harley Walter Kidder and the Vermont League of Women Voters were allowed to submit briefs as *amici curiae*.

The Appellees, in behalf of themselves and other voters similarly situated, sought a declaratory judgment that their constitutional rights were impaired by the present apportionment of the Vermont General Assembly. They further sought to enjoin the governor, secretary of state, a county clerk and a town clerk from engaging in any general election duties or holding elections for the General Assembly until a reapportionment shall have been effected in accordance with the Fourteenth Amendment, or, in the alternative, that elections to the General Assembly be held at large.

On October 29 and 30, 1963, a hearing was held on the merits of the amended complaint. On July 10, 1964, the Court filed with the District Clerk for the District of Vermont an opinion in which it held that the Fourteenth Amendment to the Federal Constitution is being violated by the present apportionment of the Vermont General Assembly. On July 22, 1964, a hearing was held by the Court in order

to determine what orders should be included in the judgment.

On August 3, 1964, the Court issued its judgment order. Under the terms of said order, the defendants were "perpetually enjoined from doing any act or taking any steps in furtherance of nominating or holding elections of senators or representatives to the Senate or House of Representatives of the State of Vermont" unless senators and representatives were elected by some constitutional method. The Court did allow the September primary and November general election to be conducted as presently scheduled but prohibited those elected from enacting any legislation other than devising a constitutional method of apportionment. The Court further ordered that the terms of the members of the General Assembly elected in November of 1964 for a term of two years should expire on March 31, 1965.

The special session of the 1963 General Assembly took final adjournment on March 13, 1963, and has not been in session since that date. The terms of those legislators will expire on January 5, 1965, and the terms of the 1965 legislators will commence on January 6, 1965, said date being the beginning of the 1965 regular session.

ARGUMENT

I

THE DISTRICT COURT ABUSED ITS DISCRETION IN ENJOINING THE GENERAL ASSEMBLY FROM ENACTING LEGISLATION PROVIDING FOR THE NORMAL OPERATION OF STATE AND MUNICIPAL GOVERNMENT PENDING A SATISFACTORY REAPPORTIONMENT OF THE GENERAL ASSEMBLY IN ACCORDANCE WITH THE ORDER OF THE COURT

A. *The Court Should Find an Abuse of Discretion on the Part of a District Court When the Action of Said Court in Enjoining the Passage of Legislation is Contrary to Equitable Principles and Improvident*

It is recognized as a general principle that action of a three-judge District Court in granting an injunction will not be disturbed on appeal in the absence of showing an abuse of discretion. *U. S. v. Corrick* (1936), 298 U.S. 435, 80 L.Ed. 1263, 56 S.Ct. 829. The Appellants submit that the present

case involves an abuse of discretion of a most clear and unmistakable nature.

The test in determining whether or not a lower court has abused its discretion in the granting or denying of an injunction has been established. This Court has indicated that a decision pertaining to an interlocutory injunction will not be reversed unless its action is contrary to some rule of equity or improvident.

> "A decree of the district court denying an interlocutory injunction will not be reversed unless shown to be contrary to some rule of equity or the result of an improvident exercise of judicial discretion."
>
> *National Fire Insurance Company* v. *Thompson* (1930), 281 U.S. 331, 338; 74 L.Ed. 881, 887; 50 S.Ct. 326, —.

In the case of *Home Owners' Loan Corporation* v. *Huffman* (1943), 134 F.2d 314, it was held:

> "Where an appellate court has power to review the exercise of judicial discretion, the inquiry is confined to whether the situation and the circumstances clearly show an abuse of discretion, that is, arbitrary action by failure to apply the appropriate equitable and legal principles to the established or conceded facts and circumstances."
>
> *Home Owners' Loan Corporation* v. *Huffman*, 134 F.2d 314, 317.

An abuse of discretion is shown where a court fails to properly apply the law to conceded or undisputed facts *Clemons* v. *Board of Education of Hillsboro* (1956), 228 F.2d 853, involved a case where the District Court refused to enjoin a school board from enforcing a policy of racial segregation. In holding that the District Court had abused its discretion, it was held:

> "It follows that the judgment of the District Court is contrary to the rules of equity and constitutes an improvident exercise of judicial power. It is generally held that the trial court abuses its discretion when it fails or refuses properly to apply the law to conceded or undisputed facts. *Union Tool Co.* v.

Wilson, 259 U.S. 107, 112, 42 S.Ct. 427, 66 L.Ed. 848. Misapplication of the law to the facts is in itself an abuse of discretion. * * * Such abuse of discretion requires reversal."

Clemons v. *Board of Education of Hillsboro*, 228 F.2d 853, 857.

Under the provisions of 42 U.S.C. 1988, dealing with proceedings in vindication of civil rights, the common law, as modified by state statutes in the state wherein the court having jurisdiction of the matter is held, may be used to furnish suitable remedies. In *Hubbard* v. *Hubbard* (1904), 77 Vt. 73, 58 A. 969, the Vermont Supreme Court held that judicial discretion may be exercised only within the bounds of reason:

"It is the essence of all law that when the facts are the same the result is the same. It is always necessary in the decision of a matter in court that the judge should have in mind first a rule or standard, and second the facts which are to be tested thereby. But certain matters seem hardly to admit of the formulation of inflexible rules in advance and to be most wisely left to the sound judgment of the magistrate when the exigency shall arise, leaving him to be governed by the general analogies of the law and his own sense of justice. The better view seems to be that even in these instances he is not all together a law unto himself, but may be overruled if his action is such as to shock the universal, or the common, sense of what is right among his fellows. *All judicial discretion may thus be considered as exercisable only within the bounds of reason and justice in the broader sense, and to be abused when it plainly overpasses these bounds.*" (Emphasis added.)

Hubbard v. *Hubbard*, 77 Vt. 73, 77; 58 A. 969, 970.

It has been held that irreparable harm should be construed by a court in the granting or denying of an injunction. Failure to consider this factor can be enough to show abuse of discretion.

This Court has held that the issue of irreparable harm should be of prime importance in determining whether or not an interlocutory injunction should be granted.

> "Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to opposing party, even if the final decree be in his favor, will be inconsiderable, * * * the injunction usually will be granted."
>
> *Ohio Oil Co.* v. *Conway* (1929), 279 U.S. 813, 815; 73 L.Ed. 972, 973; 49 S.Ct. 256, —.

In *Drew* v. *Scranton* (1963), 229 F. Supp. 308, a three-judge District Court refused to enjoin the legislature from acting upon reapportionment bills which, as drafted, raised serious questions of constitutional validity. The Court said:

> "* * * we are satisfied that in the exercise of a sound discretion we should not attempt, upon this application for a temporary injunction, to pass upon the constitutional validity of the pending reapportionment bills upon the assumption that they will be enacted in their present form or that we should enjoin the Legislature from further consideration of them. In this connection we note that no showing of irreparable injury has been made."
>
> *Drew* v. *Scranton*, 229 F. Supp. 308, 310.

In the case at bar, the District Court went beyond the mere enjoining of action upon reapportionment bills which may not be constitutional and enjoined the legislature from enacting any laws which are necessary for the continued operation of state government. The Appellees failed to show that irreparable harm would result from the enactment of laws in the normal operation of state government. Irreparable harm is caused to Appellants and the State by the refusal to allow the enactment of such laws.

B. *Under the Facts of this Case, the Action Taken by the District Court in Enjoining the Vermont General Assembly from Enacting Legislation other than Reapportionment was Clearly Inequitable and Improvident*

The House of Representatives of the Vermont General Assembly is and always has been apportioned in accordance with the terms of the Vermont Constitution. The Senate of the Vermont General Assembly is apportioned in accordance with the Vermont Constitution as interpreted by the Vermont Supreme Court. The Vermont General Assembly meets biennially each odd numbered year. The opinion of the three-judge Court filed on July 10, 1964, and the judgment dated August 3, 1964, were made after the 1963 General Assembly had adjourned. Thus, the Vermont General Assembly has never had an opportunity to review its legislative apportionment subsequent to the decision of the Court.

It is true that the Governor of the State could have called a special session of the 1963 General Assembly after August 3, 1964. The Governor, in the exercise of his judgment, did not do so. In making a determination of this nature, the Governor had to consider the likelihood of action by the General Assembly under the known facts which existed at that time. The United States Congress did not adjourn until October 3, 1964. Prior to adjournment of Congress, various bills and resolutions were introduced pertaining to the reapportionment issue. With that situation present, it is almost a certainty that no special session of the Vermont General Assembly would have enacted reapportionment legislation.

Prior to and after October 3, 1964, the State of Vermont was engaged in an extensive election campaign. The serious question of one's rights under the Fourteenth Amendment should not be subjected to being engulfed in party politics by way of a special session in the midst of an election campaign for Governor, Congress, and all State and local offices. In this particular election, the incumbent Lieutenant Governor, who presides over the Senate, was running for Governor against the incumbent Governor.

After the election of November 3, 1964, in which the members of the 1965 General Assembly were chosen, a special

session of the "lame duck" 1963 General Assembly could have been called. Shortly after the Court's judgment, a legislative reapportionment committee began to study various methods of reapportionment in order to comply with the Court's order. The Governor at the same time appointed another committee to study reapportionment. The legislative committee has not concluded its deliberations or filed a report. The Governor's committee did not complete its deliberations or file a report until December 11, 1964. Under these circumstances, it was unlikely that "lame duck" legislators, whose terms expire on January 5, 1965, would have had time to have enacted a reapportionment law which would comply with the Court's order.

Under all of the circumstances, it is probable that the Governor exercised the best of judgment in not calling the legislature into special session. However, this is not the issue. Even if it is assumed that the Governor exercised bad judgment, the fact still remains that the legislature has not had an opportunity to comply with the Court's order. To forbid the General Assembly to carry on the normal functions of state government while considering and enacting reapportionment legislation is most unjust and inequitable.

Under the Court decree, the 1965 General Assembly can enact no legislation other than reapportionment and must enact such law before its term expires on April 1, 1965. Under the present law, primary petitions must be filed not less than forty days prior to the primary election and the general election is held fifty-six days after the primary election. Under any reapportionment plan, it will become necessary for most candidates to campaign in strange districts covering a greater geographical area with a larger population. These facts alone would be reason enough for a longer period in which to campaign. If adequate consideration is given to the various plans for apportionment, as well as changes in the numerous statutes affecting elections, it is unlikely that the General Assembly can reapportion itself much before April 1, if it can be done by that time. If reapportionment legislation was enacted on April 1, 1965, under orderly election procedures and under the present law, the election could not be completed until July 5, 1965. As the decree forbids the enactment of legislation by the 1965 General

Assembly, and as appropriations have been made only until July 1, 1965, orderly operation of state government would be completely disrupted.

Some voters and members of the legislature have urged the calling of a constitutional convention by the General Assembly. There is no provision in the State Constitution which provides for a constitutional convention. If such legislation is enacted on the theory that the General Assembly has the inherent power to call such a convention, it might well be that a declaratory judgment petition would be instituted which would result in the Vermont Supreme Court passing upon the constitutionality of this procedure. Under these circumstances, it would be impossible to elect delegates to such a convention, have them act and have voter approval in time to have a new General Assembly meet and enact laws appropriating money for the operation of state government prior to July 1, 1965.

There are also matters besides appropriations which need immediate action by the General Assembly. Some local governments have school problems that can be solved only by a change in the state laws. It is anticipated that a change in the laws pertaining to the University of Vermont will be necessary so as to allow loans to college students. It is also anticipated that Congress will enact laws which will allow grants to Vermont if enabling legislation is passed by the Vermont General Assembly. Without such enabling acts, this money will be lost.

It has been argued that an injunction against the enactment of legislation is necessary so as to force the General Assembly to reapportion. There is no logic in this argument. First, it is only an assumption that the General Assembly will refuse to reapportion itself. There is more likely to be difficulty in enacting such legislation if the members feel that they are unjustly forbidden from enacting legislation to keep state government in operation for the benefit of the people. Second, and more important, the argument fails because reapportionment is not going to be prevented in any case. The Court has made it clear that the three-judge Courts shall reapportion a legislature which fails to act after being given a reasonable opportunity.

An injunction should be denied when the harm caused to Appellees by the denial will be inconsiderable and the harm caused to Appellants by the granting thereof will be grave. There is no question but that the Vermont General Assembly will be reapportioned so as to comply with the Equal Protection Clause of the Fourteenth Amendment. There is no dispute that the General Assembly has not had an opportunity to reapportion itself since the order of the Court. Nor is there any question but what the injunction against the passage of legislation in the usual manner will cause a disruption in the operation of state government. This can and will cause irreparable harm to the State. The disruption of state government by this means will gain the Appellees nothing. The harm to the Appellees in allowing the legislature to work on bills and enact laws will be inconsiderable or nonexistent. In fact, the injunction may well work against the best interests of the Appellees. If most of the members of the General Assembly are working in committees on other important state problems, a small legislative committee can work on the important matter of reapportionment. With the Court's injunction in force, there would be nothing for the 276 members of the General Assembly to do but work on reapportionment. Under these circumstances, a large number of that body would either have to sit around doing nothing or resolve themselves into a committee of the whole to work on reapportionment. The latter course is more than likely. There is a serious question as to whether an intelligent plan could be worked out with a committee of that size. Thus, Appellees' best interests will be better served by allowing the members of the General Assembly to engage in other duties while a workable plan is formulated by a small committee.

The Appellees did not request an injunction which would forbid the legislature from carrying on the normal processes of state government while reapportioning itself. In fact, Appellees' counsel joined with other counsel in approving the so-called Governor's Plan (R., p. 106-107) prior to the court hearing on July 22, 1964. At the beginning of the hearing on July 22, 1964, counsel for Appellees again approved the Governor's Plan, except for the times contained therein.

> "Mr. Crispe: May it please the Court, I believe the Court is aware from the newspaper accounts that

a meeting was held in the Governor's Chambers in Montpelier Friday night, where the attorneys for the various parties met for the purpose of endeavoring to reach an agreement as to a plan that would be presented to this Court. The lawyers in the case all agreed to the plan which was submitted to us by Governor Hoff. I might say, that certain corrections were made at that time, but in the final analysis, the parties, or the attorneys, did not, Your Honor, sign the stipulation at that time, because they wanted to submit the plan, or the stipulation, rather, to their respective clients for approval.

I might say, Your Honor, that basically; the plan of the Governor is agreeable to the petitioners, except, that the schedule of dates, as proposed in the Governor's Plan, seems to the petitioners, not, does not come within the opinion of this Court, nor, within the spirit of the language of Judge Warren—Chief Justice Warren—in the opinions rendered by him."

(R., p. 64).

The first mention of an injunction against the legislature from enacting laws to keep state government in operation came from a member of the 3-Judge Court:

"JUDGE WATERMAN: * * * assuming that we feel exactly the way you do, and I think we are on record more or less, in other cases, as to how we feel as individuals or as individual judges, other than as we have to feel now, as inferior judges, obeying our masters,—assuming we go along with you—just assuming,—and permit the elections to go along unchallenged, untrampled, and uneffected; * * * as the present Attorney General of this State, what do you have to say as to the legislation such an assembly might pass?

GENERAL GIBSON: I think there is a substantial body of law, Your Honor, that says that this type of legislation is valid and constitutional.

JUDGE WATERMAN: What would you say to our going along with you and saying that the first and only order of business of the 1965 General Assembly,

> so elected, shall be to submit to the people a reapportionment plan, and shall then recess and do no more business until that reapportionment plan is acted upon and approval of the Court is received?"
>
> (R., p. 75-76).

It thus becomes clear that Appellees did not suggest such a drastic injunction and made no showing of irreparable harm to them by failing to so enjoin the General Assembly. The idea originated from the Court, apparently due to the erroneous belief that the legislature would not have the power to act on such legislation.

Mr. Justice Douglas in *Baker* v. *Carr* (1962), 369 U.S. 186, 7 L.Ed.2d 663, 82 S.Ct. 691, stated in a footnote that a malapportioned legislature had the power to act.

> "The recent ruling by the Iowa Supreme Court that a legislature, though elected under an unfair apportionment scheme, is none-the-less a legislature empowered to act (*Cedar Rapids* v. *Cox* 252 Iowa 948, 964, 108 N.W. 2d 253, 262, 263; cf. *Kidd* v. *McCanless*, 200 Tenn. 273, 292 S.W.2d 40) is plainly correct."
>
> *Baker* v. *Carr*, 369 U.S. 186, 250; 7 L.Ed.2d 663, 705; 82 S.Ct. 691, ——.

The case of *Cedar Rapids* v. *Cox* (1961) 252 Iowa 948, 708 N.W.2d 253, which was cited with approval by Justice Douglas, indicated that the courts should prevent chaos from resulting in legislative reapportionment cases. To the same effect are *Dawson* v. *Bomar* (1963), 322 F.2d 445 and *Opinion to the Governor* (R. I., 1962), 185 A.2d 111. Chaos will certainly result if the legislature cannot pass laws to keep state government in normal operation.

C. *Under the Recent Decisions of This Court, the State Legislatures are Allowed an Opportunity to Reapportion and Judicial Relief is Appropriate only When the Legislature Fails To Comply With The Court's Order.*

Chief Justice Warren speaking for this Court in *Reynolds* v. *Sims* (1964), 32 L.W. 4535, 377 U.S. 533, 12 L.Ed 2d —, 84 S.Ct. 1362, commended the District Court in declining further action until the Alabama Legislature had been given an opportunity to act.

> "We feel that the District Court in this case acted in a most proper and commendable manner. It initially acted wisely in declining to stay the impending primary election in Alabama, and properly refrained from acting further until the Alabama Legislature had been given an opportunity to remedy the admitted discrepancies in the State's legislative apportionment scheme, while initially stating some of its views to provide guidelines for legislative action. And it correctly recognized that Legislative reapportionment is primarily a matter for legislative consideration and determination, *and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.*" (Emphasis added).
>
> *Reynolds* v. *Sims*, 32 L.W. 4535, 4550; 377 U.S. 533, ——; 12 L.Ed.2d ——; 82 S. Ct. 1362, ——.

The District Court in the case at bar acted contrary to the clear language of the Chief Justice. The Court attempted on its own iniative to give judicial relief by enjoining the General Assembly from enacting laws before it had been given a timely opportunity to reapportion itself.

This Court in the *Maryland Committee for Fair Representation* v. *Tawes* (1964), 32 L.W. 4573, 377 U.S. 656, 12 L.Ed.2d ——, 84 S.Ct. 1429, indicated that the Maryland legislature had time to act before the next regular election and that the District Court need take no further action unless the legislature refused to comply with the order.

> "Since primary responsibility for legislative apportionment rests with the legislature itself, and since adequate time exists in which the Maryland General Assembly can act, the Maryland courts need feel obliged to take further affirmative action only if the legislature fails to enact a constitutionally valid state legislative apportionment scheme in a timely fashion after being afforded a further opportunity by the courts to do so. However, under no circumstances, should the 1966 election of members of the Maryland Legislature be permitted to be conducted pursuant to the existing or any other unconstitutional plan."
>
> *Maryland Committee for Fair Representation* v. *Tawes*, 32 L.W. 4573, 4578; 377 U.S. 656, ——, 12 L.Ed.2d ——, 84 S.Ct. 1429, ——.

Mr. Justice Douglas in his concurring opinion in *Baker* v. *Carr* (1962), 369 U.S. 186, 7 L.Ed.2d 663, 82 S.Ct. 691, stated that equity principles should apply.

> "The justiciability of the present claims being established, any relief accorded can be fashioned in the light of well-known principles of equity."
>
> *Baker* v. *Carr*, 369 U.S. 186, 250; 7 L.Ed.2d 663, 705, 82 S.Ct. 691, ——.

Under the well-known principles of equity, the Vermont General Assembly should be allowed to keep the government of Vermont in normal operation while considering and adopting a new apportionment plan which will have complied with the order of the Court. To forbid such normal operation would be contrary to any known principles of equity.

Mr. Justice Douglas further cited with approval the case of *Magraw* v. *Donovan* (1958), 163 F. Supp. 184, wherein the Court held:

> "* * * It is not to be presumed that the Legislature will refuse to take such action as is necessary to comply with its duties under the State Constitution. We defer decision on all the issues presented (including that of the power of this Court to grant relief), in order to afford the Legislature full opportunity to 'heed the constitutional mandate to redistrict.' * * *

> It seems to us that if there is to be a judicial disruption of the present legislative apportionment or of the method or machinery for electing members of the State Legislature, it should not take place unless and until it can be shown that the Legislature meeting in January 1959 has advisedly and deliberately failed and refused to perform its constitutional duty to redistrict the State."
>
> *Magraw* v. *Donovan*, 163 F. Supp. 184, 187, 188.

In the *Magraw* case, the Minnesota legislature had refused to redistrict in accordance with its own constitution from 1913 to 1958. In Vermont, on the other hand, the General Assembly is apportioned in accordance with its own constitution and was not knowingly in violation of the law until the decision of the District Court in this case. The Vermont General Assembly has been given no opportunity by the District Court to enact a new apportionment law and to continue the orderly processes of state government in the interim.

II

The Court Abused its Discretion in Limiting the Term of Office of Members to the 1965 General Assembly to March 31, 1965

The Court abused its discretion in allowing the legislature only three months to solve the complicated problem of reapportionment. The Appellants clearly recognize the careful balancing which must be done so as to protect Appellees' constitutional rights on the one hand and to avoid the complete breakdown of state government on the other hand. It is submitted that any time limit should be such so as to allow a special election of a reapportioned legislature in the Fall of 1965 so that its members would be ready to serve in January of 1966. It would be dangerous for the welfare of the State to allow the terms of members to the 1965 General Assembly to expire without reservation prior to the election of a new legislative body. Until a reapportioned legislature is ready to take office, some provision should be made for calling the presently elected members of the 1965 General Assembly into special session for purposes other than reapportionment. This

would assure the existence of legislative machinery to take care of any emergency, such as war. Without such a provision, the State could find itself in an impossible situation where there would be no General Assembly and no means of bringing one into existence between the time the General Assembly enacts reapportionment legislation and the time a reapportioned legislature takes office.

CONCLUSION

Most of our states have the same or similar problems relative to malapportioned legislatures. There is a wide variation between three-judge District Courts concerning their orders in such cases. The District Court in the case at bar, by enjoining legislative action other than reapportionment, appears to have made one of the most severe orders for this type of case. By this order, the District Court has abused its discretion as its action was inequitable and improvident.

Wherefore, Appellants pray that the Honorable Court hold that the District Court abused its discretion in enjoining the legislature from carrying on its normal business while considering and enacting a reapportionment statute which conforms with the Fourteenth Amendment. They further pray that the Honorable Court hold that the District Court abused its discretion in limiting the terms of office of the 1965 legislators to three months under the circumstances of this case. They further request that the Honorable Court approve a time schedule which will assure the re-election of a reapportioned legislature in the Fall of 1965 and to allow the normal operation of state government to continue in the interim.

Respectfully submitted,

CHARLES E. GIBSON, JR.,
Attorney General
CHESTER S. KETCHAM,
Deputy Attorney General

December 1964